84-1059

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL M. FENNESSY, ET ANO.,

Petitioners,

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court clearly erred in (A) summarily dismissing the antitrust complaint herein and in (B) summarily fining appellants' counsel without a hearing while leaving a one million dollar counterclaim still pending and unprovided for.

2. Whether the District Court abused its discretion in failing to permit appellants to amend their complaint for any presumed defect found therein.

3. Whether the District Court clearly erred or abused its discretion in failing to receive and consider some 57 responses to plaintiffs' first set of written interrogatories due and unanswered as of March 12, 1984.

4. Whether the Second Circuit Court of Appeals correctly ruled that it was "without jurisdiction" to hear appellants' appeal herein or rather was remiss in its judicial and statutory duty in erroneously declining jurisdiction in not hearing the appeal.

PARTIES

1. Plaintiffs-appellants and Petitioners: Paul M. Fennessy and Audrey E. Guthrie, individually and as executrix of the estate of Wallace D. Guthrie, deceased.

2. Defendants-appellees and Respondents:

A. Dairy Queen Group of Defendants: International Dairy Queen, Inc., and D/BA IDQ Distributors, Dairy Queen Supply and FSI; American Dairy Queen Corporation; Dairy Queen Financial, Inc.; Dairy Queen Realty, Inc.; Brazier Foods, Inc.; Golden Skillet International, Inc.; "Dairy Queen" National Dealer Marketing Council; "Dairy Queen" Territory Operators Advisory Council; "Dairy Queen" Territory Operators Advisory Council; Dairy Queen Frozen Products (Canada) Limited; IDQ Distributors of Canada, Limited; "Dairy Queen" Canadian Dealer Marketing Council; Texas Dairy Queen Operators Council; Dairy Queen Japan Co., Ltd.; Dairy Queen Japan National Dealer Marketing Council and the Queen's Jesters.

B. Dairy Queen Supplier Group of Defendants:

American Can Company; Bagcraft Corp. of America; Beatrice Food Company; Beck Vanilla Products Company; Butcher Boy Food Products, Inc.; Campbell-Mithun Incorporated; Carter Paper Company; Cash Plus, Inc.; The Coca-Cola Company; Commercial Testing Laboratory Inc.; Crowley Foods, Inc.; The Continental Group, Inc.; Continental Can Company, Inc.; Delicious Food Co.; Dolphin Seafood Division of SCM Corp.; Econovent Systems, Inc.; Dairy Queen of New Jersey, Inc.; Fisher Nut Company; George Fox Company; George & Thomas Cone Company; Granite State Packing Company; Green Bay Foods Company; H.C. Duke & Son, Inc.; Henry & Henry, Inc; Hickman, Coward & Wattles, Inc.; Hunt-Wesson Foods, Inc.; Iceland Seafood Corporation; Interbake Foods, Inc.; J. Hungerford Smith Company, Inc.; Keebler Company; Kraft, Inc.; Lever Brothers; Lind Plastic Products, Inc.; Liqui-Box

Corporation; Maryland Cup Corporation; Eagle Cone Corp.; Eastern Baking Company, Inc.; Sweetheart Plastics, Inc.; Nieco Product, Inc.; Owens-Illinois, Inc.; Pepsico, Inc.; Premier Industries; Queens Farms Dairies, Inc.; Richardson Corporation; Shade Foods, Inc; Schweigert Meat Company; Standard Foods, Inc.; Sysco Frosted Foods, Inc.; Stoelting Bros., MFG. Co., Inc.; Stewart Sutherland, Inc.; Summit Travel Service; The Terson Company, Inc.; Ward-Johnston, Inc.; Union Carbide Corp.; United Brands Company; Upstate Milk Cooperative, Inc.; Victor Foods Inc.; Valmac Industries, Inc.; Worcester Quality Foods, Inc.

C. Named defendants not served as of the date of dismissal or found insolvent or against whom the action was discontinued as of March 12, 1984:

Allied Meat Co.; Cummings Incorporated; Dart Corp.; Garden State Farms, Inc.; Food Service Products Company; G.D. Anderson Associates;

Clazer, Crandall Company; Han-Dee Pak, Inc.; Hank Ketchum; Interstate Distributors, Inc. Food Producers (Int'l), Inc.; Plastics, Inc.; Presto Food Producers, Inc.; Suzanna's Kitchen, Inc. and the Travelers Indemnity Company and General Mills, Inc.

v.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL M. FENNESSY, ET ANO.,

Petitioners,

-against-

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Respondents.

PRAYER

Petitioners Paul M. Fennessy, Audrey E. Guthrie and Thomas A. King, their attorney, respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this matter on October 15, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. The opinion of the District Court for the Northern District of New York together with its order staying the sanction against counsel also appears in the Appendix.

JURISDICTION

The order of the Court of Appeals for the Second Circuit was entered on October 15, 1984. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

This is an appeal from the order of Chief Judge Howard G. Munson of the Northern District of New York summarily dismissing a private treble damage antitrust action brought by two Dairy Queen franchisees against the

Dairy Queen fast food franchisor and a group of approved suppliers for violations of the Sherman and Clayton Acts. The appeal was dismissed by the Second Circuit Court of Appeals after having been extensively briefed and fully argued in that Court on October 15, 1984.

The complaint was filed on December 29, 1983 and as of March 12, 1984, the date of the complaint's dismissal "without prejudice" but without leave to re-plead, plaintiffs had served some 77 of the 90 named defendants and voluntarily dismissed as to one.* Plaintiffs served their first set of written interrogatories with the complaint on all defendants except the Dairy Queen group of defendants. 15 defendants had answered the complaint as

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*The complaint was dismissed as to all 77 defendants although only 9 defendants moved to dismiss.

of March 12, 1984. 9 defendants moved to dismiss the complaint on that date. 5 defendants had formally answered plaintiffs' interrogatories on March 12, 1984, while 2 others had provided informal responses. Pursuant to stipulation and order entered thereon by Judge Munson, answers from defendants SCM Corp., Geo. & Thos. Cone Co., H.C. Duke & Son, Inc., Schweigert Meat Co., Bagcraft Corp. of America, Carter Paper Co. and Plastics, Inc. were due on March 15, 1984. Answers from Beck Vanilla Products Co., Liqui-Box Corporation, Queens Farms Dairies, Hickman, Coward & Wattles, Interstate Distributors and Lind Plastic Products would all have been due between March 19 and March 23, 1984. The answers of Iceland Seafood, United Brands, Shade Foods and Geo. Fox Co. would all have been due from March 28 through April 9, 1984. In addition, again, as in most cases, stipulated and ordered by Judge Munson, some 57 answers to plaintiffs'

first set of written interrogatories would have been due from the defendants between March 20 and April 1, 1984. Several defendants were in default of answering the interrogatories and had no stipulation extending their time to answer the same. In sum, a large and important number of interrogatory answers and pertinent evidence would have been in the Court's hands for evaluation within the next 15 days, all of which evidence was never received by reason of its ruling of March 12, 1984.** The case is fundamentally a pleading case, but the appeal and this petition raise other very important issues of public policy under the antitrust laws and judicial policy concerning the sanctioning of counsel under Rule 11.

**Plaintiffs granted liberal extensions of time to answer both the complaint and interrogatories to every requesting defendant.

The petitioners here respectfully ask that this Court review the conduct of the District Court in summarily dismissing a private treble damage antitrust action and ignoring more than a thousand pages of documentary evidence and numerous affidavits of record and in the Second Circuit Court of Appeals' declining to hear the appeal in the face of the outright dismissal of the complaint.

The question is squarely raised in this petition whether there are two standards of procedure in handling Sherman and Clayton act complaints; one standard for the mighty and one standard for the small businessman. Petitioners feel that they have been denied and are being denied both due process of law and equal protection of the laws.

Considering the actions of the District Court in summarily sanctioning petitioners' counsel with a fine of $1,000.00 payable in 10 days,

then staying the sanction four days later, and the District Court's failure to issue any reasoned opinion concerning either its dismissal or the sanction, together with its failure to consider or provide for an outstanding counterclaim of One Million Dollars, still pending and undismissed by the Court, a record is presented so bizarre and eccentric as to warrant a detailed review by this Supreme Court, which is responsible for the proper administration of justice throughout the federal courts in the United States.

REASONS FOR GRANTING THE WRIT

1. The decisions below conflict with the well established precedents of this Court disapproving of the summary dismissal of private treble damage antitrust actions as against public policy.

This Court has repeatedly stated that an antitrust complaint should rarely be dismissed

by summary means. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct.486, 7 L. Ed.2d 458 (1962). The Court had also enunciated the most liberal interpretation of what must be alleged in an antitrust complaint to make it legally sufficient in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 81 S.Ct. 365, 5 L. Ed. 2d 358 (1961): "[T]o state a claim upon which relief can be granted under that section, (Sherman Act), allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." 364 U.S. at 660, 81 S. Ct. at 367, 5 L.Ed. 2d at 361. This Court has held, that where that much is alleged the complaint cannot be dismissed. Here petitioners have more than met this standard. Any fair reading of the complaint would indicate that the plaintiffs have well pleaded numerous antitrust violations against the defendants. Moreover, affidavits and

other documentary evidence on file exceeding one thousand pages establish that a solid foundation in fact exists underlying the allegations in the complaint.

The failure to permit an amended complaint on this kind of record directly ignores and conflicts with this Court's injunctions in Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L. Ed.2d 222, 226 (1962): "Rule 15(A) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded... Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of discretion and inconsistent with the spirit of the Federal Rule."

2. The order of the Second Circuit Court of Appeals in finding "unappealable" the final and complete dismissal of plaintiffs' complaint is clearly erroneous in light of a fully reasoned opinion of the same Court.

The Second Circuit has previously considered and ruled on the procedure employed by the District Court here in dismissing a complaint "without prejudice" in a fully reasoned opinion: Elfenbein v. Gulf & Western Industries, Inc., 590 F. 2d 445 (1978). There, in a per curiam opinion, the Second Circuit, including J. Oakes, the presiding justice here as well, that court found that it had jurisdiction to hear the appeal but disapproved of dismissals "without prejudice" as Judge Munson did here: "The district court's dismissal of the complaint 'without prejudice to its renewal' could certainly be read as an order granting the plaintiff leave to amend her complaint. However, we find it impossible to determine

to any real degree of certainty what the district court intended.... 590 F.2d 445 at 449. We also strongly suggest to the district courts that they use the terms 'with prejudice' or 'without prejudice' only when making a determination as to the res judicata effect of a dismissal.... Ibid. We see no point in imposing upon a plaintiff the burden of instituting a new action and subjecting her to the risk of being unable to once again obtain personal jurisdiction over a defendant.... A plaintiff is entitled to have an appellate court review the sufficiency of the dismissed pleading...." 590 F.2d 445 at 450. (Emphasis added.) The court concluded that a pleading dismissed, as here, "without prejudice" was a final and appealable order. Accord, United States v. Wallace & Tiernan Co., 336, U.S. 793, 794, 69 S. Ct. 824, 825, 93 L. Ed. 1042, 1047 (1949), Note 1: "That the dismissal was without prejudice to filing another suit does not

make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned."

3. The summary imposition of a $1,000 fine on plaintiff's counsel without a reasoned opinion, without a specific finding of bad faith and without any evidence of record justifying such action should be disapproved.

The fining of an attorney attempting to file an antitrust complaint without a fully developed record; without an evidentiary hearing; without a reasoned opinion and without any finding of bad faith is unprecedented as the presiding judge at the Second Circuit commented at the oral argument of the appeal. The procedure employed by the District Court is in total conflict with the leading case in the Second Circuit and the procedures laid down there, Nemeroff v. Abelson 620 F.2d 339

(2d Cir. 1980) and 704 F.2d 652 (1983). It is also calculated to stifle possible just antitrust claims by striking fear in to plaintiff's counsel. It is a very old and strong policy of our government to encourage, not discourage private antitrust enforcement. This is why attorneys fees are awarded the successful plaintiff and never awarded to the successful defendant. Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (3rd Cir. 1967). Permitting sanctions against plaintiffs' counsel, especially where, as here, not warranted beyond preadventure of doubt, equally acts as an inhibition on bringing private antitrust actions.

RECORD ON APPEAL

Petitioners strongly entreat this Court to order the transmission of the Record on Appeal from the Second Circuit in evaluating the instant petition. Evidence of record

exceeding one thousand pages fully documents the factual basis for plaintiffs' complaint, whereas neither the District Court nor the Second Circuit Court of Appeals has commented on as much as one item of evidence. Where "undisputed facts disclose a violation of the statute...." certiorari is warranted. See Arizona v. Maricopa County Medical Society, 457 U.S. 332 at 336. 102 S. Ct. 2466, - 73 L. Ed.2d 48 at 53 (1982). Petitioners, simultaneous with the docketing of this petition are requesting the clerk of the Second Circuit to certify the record to this Court, but counsel has been informed orally by the clerk's office that they will not do so without This Court's request.

CONCLUSION

The petitioners pray that this Court grant a Writ of Certiorari to review the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

Robert B. Shaad, Attorney of Record
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APPENDIX

U.S. District Court
N.D. of N.Y.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

March 5, 1984

PAUL M. FENNESSY and AUDREY E. GUTHRIE
Individually and as Executrix of the
Estate of Wallace D. Guthrie, Deceased,

Plaintiffs,

v.

INTERNATIONAL DAIRY QUEEN, INC., et al.,

Index No. 83CV1720

ORDER

Defendants.

HOWARD G. MUNSON, C.J.

ORDER

Upon consideration of the defendants' motion for dismissal and/or for sanctions and the plaintiffs' motion for an Order pursuant to Fed. R. Civ. P. 5(c) regarding the service of papers; and upon consideration of the complaint and all affidavits, memoranda and exhibits submitted in support and in opposition thereto; and upon consideration of the oral arguments of plaintiffs' counsel and of

counsel for the various defendants on March 12, 1984; it is hereby

ORDERED that, pursuant to Local Rule 7 and Federal Rules 8 and 11, the complaint is dismissed without prejudice as to all named defendants; and it further

ORDERED that, pursuant to Federal Rule 11, Thomas A. King, counsel for plaintiffs, is fined the sum of One Thousand Dollars ($1,000.00), payable to the Clerk of the United States District Court of the Northern District of New York on or before March 22, 1984.

Dated: March 15, 1984
Syracuse, New York

Howard G. Munson
Chief U.S. District Judge

U.S. District Court
N.D. of N.Y.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

March 5, 1984

PAUL M. FENNESSY and AUDREY E. GUTHRIE
Individually and as Executrix of the
Estate of Wallace D. Guthrie, Deceased,

Plaintiffs,

v.

INTERNATIONAL DAIRY QUEEN, INC., et al.,

Index No. 83-CV-1720

ORDER

Defendants.

Upon reading the application and motion for a stay of the execution of a certain fine of $1,000.00 herein on Thomas A. King, attorney for plaintiffs, announced in open court on March 12, 1984 and due and payable on March 22, 1984, and upon reading the affidavit of attorney King in support of said application for a stay, and considering and provided that a timely notice of appeal is filed, perfected and prosecuted herein, then it is,

ORDERED, that the fine of $1,000.00 imposed on attorney King and the execution thereof is stayed until the determination of the appeal by the Second Circuit Court of Appeals in this matter, from this Court's Order dismissing the complaint in its entirety.

Dated: March 19, 1984
Syracuse, New York

Howard G. Munson, U.S. Dist. Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of October, one thousand nine hundred and eighty-four.

United States Court of Appeals
filed
October 15, 1984
Elaine B. Goldsmith, Clerk
Second Circuit

Present:

Hon. James L. Oakes,
Hon. Amalya L. Kearse,
Hon. George C. Pratt,
Circuit Judges.

Paul M. Fennessy and Audrey E. Guthrie, individually and as executrix of the Estate of Wallace D. Guthrie, Deceased,
Appellants.

v.

International Dairy Queen, Inc., and d/b/a IDQ Distributors Dairy Queen Supply and FSI, et al.,
Appellees.

ORDER

Appeal from dismissal of complaint by the United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, pursuant to Fed. R. Civ. P. 8 and 11 and Rule 7 of the General Rules

of the United States District Court for the Northern District of New York. Attorney Thomas A. King also seeks by this appeal to set aside so much of the court's order made pursuant to Fed. R. Civ. P. 11 fining him $1,000, which order was stayed pending this appeal.

It appearing on argument that an outstanding counterclaim has not been ruled upon and no certificate under Rule 54(b) having been filed, this court is without jurisdiction to hear the appeal.

Appellees' motion for attorneys' fees on this appeal is denied.

Appeal dismissed.

_____

_____

_____

Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Supreme Court, U.S.
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CLERK

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No. _____

In the

Supreme Court of the United States

October Term, 1984

PAUL M. FENNESSY, ET ANO.,

Petitioners,

against

INTERNATIONAL DAIRY QUEEN, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT INTERNATIONAL DAIRY QUEEN, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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680 F.2d 1338 (11th Cir. 1982) 2

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586 F.2d 1275 (8th Cir. 1978) 2

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8 Wright, Miller & Kane, Federal Practice & Procedure

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit correctly rule that it lacked jurisdiction to hear petitioners' appeal?

SUMMARY OF ARGUMENT

Petitioners appealed to the United States Court of Appeals for the Second Circuit from a district court order dismissing their Complaint with prejudice. The district court never has dismissed or otherwise ruled upon the Counterclaim which has been asserted against petitioners, and did not direct the entry of a final judgment as to petitioners' claims. Consequently, as the court of appeals correctly ruled, there is no final order or judgment from which petitioners validly can appeal.

ARGUMENT

Petitioners Paul M. Fennessy and

Audrey E. Guthrie commenced this action against 97 defendants in the United States District Court for the Northern District of New York. One of these defendants has counterclaimed against petitioners.

After the service of the Complaint upon them, respondent International Dairy Queen, Inc., and several other defendants moved the district court for an order dismissing petitioners' Complaint. On March 15, 1984, the district court dismissed the Complaint as to all named defendants without prejudice. Neither at that time nor at any other time has the district court dismissed or otherwise ruled on the counterclaim against petitioners.

Petitioners appealed the district court's order of March 15, 1984, to the United States Court of Appeals for the Second Circuit. On October 15, 1984, the court of appeals dismissed peti-

tioners' appeal, ruling that it was "without jurisdiction to hear the appeal" because "an outstanding counterclaim has not been ruled upon and no certificate under Rule 54(b) [has] been filed." The appellate court's determination that it lacked jurisdiction to hear the appeal because no final judgment had been entered pursuant to Rule 54 clearly was correct. See, e.g., Boudeloche v. Tnemec Company, 693 F.2d 546, 547 (5th Cir. 1982); In re Yarn Processing Patent Validity Litigation, 680 F.2d 1338 (11th Cir. 1982); Encoder Communications, Inc. v. Telegen, Inc., 654 F.2d 198 (2d Cir. 1981); Top Value Meats, Inc. v. FTC, 586 F.2d 1275 (8th Cir. 1978); 8 Wright, Miller & Kane, Federal Practice & Procedure Civil 2d § 2660 (1983); 6 Moore's Federal Practice ¶ 54.34[2.-2] & ¶ 54.35[1] (2d

ed. 1983).[1]

CONCLUSION

Petitioners improperly have argued the merits in this Court although the court of appeals lacked jurisdiction to hear petitioners' appeal from the district court's March 15 Order. Petitioners'

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[1] In their petition, petitioners never dispute that an outstanding counterclaim which prevents the entry of final judgment precludes the court of appeals from having jurisdiction to hear an appeal. Instead, petitioners cite two cases for the proposition (undisputed by respondent) that a pleading dismissed without prejudice can constitute an appealable order so long as it disposes of all issues before the court. Neither cited case in any way concerns multiple claims situations like the one at issue herein, which are covered by Rule 54(b) of the Fed. R. Civ. P.

petition for writ of certiorari should be denied.

Respectfully submitted,

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